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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-781

UNITED STATES OF AMERICA,

Respondent.

VS.

JOHN M. GERAGHTY,
PHILIP R. GRANA,
EDWARD McGEE,
MIKE ZAKOIAN,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
History of the Case	2
Questions Presented	3
Constitutional Provisions Involved	3
Rules Involved	4
Reasons for Granting the Writ	5
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Bronston v. *United States*, 409 U.S. 352	13
Chubet v. *United States*, 414 F. 2d 1018 (8th Cir. 1969)	8
Confederation of Police v. *Conlisk*, 489 F. 2d 881 (7th Cir. 1974)	6
Kotteakos v. *United States*, 328 U.S. 750	11
McElroy v. *United States*, 164 U.S. 76, 17 S. Ct. 31, 41 L. Ed. 355 (1896)	7
Metheany v. *United States*, 365 F. 2d 90 (9th Cir. 1966)	7
United States v. *Eagleston*, 417 F. 2d 11 (10th Cir. 1969)	9
United States v. *Ostrowsky*, 501 F. 2d 318 (7th Cir. 1974)	11
United States v. *Pacente*, 490 F. 2d 661 (7th Cir. 1974)	6

United States v. *Roselli*, 432 F. 2d 879 (9th Cir. 1970) 9
United States v. *Scott*, 413 F. 2d 932 (7th Cir. 1969) 8
United States v. *Spector*, 326 F. 2d 345 (7th Cir. 1963) 7
United States v. *Varelli*, 407 F. 2d 737 (7th Cir. 1969) 11

OTHER AUTHORITIES:

Rule 8(a) Federal Rules of Criminal Procedure 9
Rule 8(b) Federal Rules of Criminal Procedure 7, 9
Rule 14 Federal Rules of Criminal Procedure 6, 9
Rule 51 Chicago Police Department Rules and Regulations 5, 6, 7

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 23, 1974.

OPINION BELOW

The opinion below has not yet been published but is reprinted herein as Appendix A infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A infra) was entered on October 23, 1974. A timely motion for a petition for rehearing en banc was denied on November 21, 1974. (Appendix B, infra) This petition is filed within 30 days of the final order of the United States Court of Appeals. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

HISTORY OF THE CASE

Your petitioners, along with nineteen other Chicago policemen, were indicted for conspiracy to extort monies from tavern owners in a particular district in Chicago in violation of 18 U.S.C. 1951. Fifteen of the defendants were also charged with giving false declarations before a Grand Jury in fifteen separate perjury counts. The basis of those counts was that these officers denied the accusation of taking money from the tavern owners while they, the officers, were under oath in the Grand Jury. Motions to sever the counts and motions for severance of defendants were denied prior to trial. After a lengthy trial, nineteen defendants were convicted and four defendants were acquitted.

QUESTIONS PRESENTED

1. Was the joinder of a conspiracy count with fifteen separate perjury counts proper under Rules 8(b) and 14 of the Federal Rules of Criminal Procedure?

2. Was the joinder of defendants charged only on the conspiracy count proper when joined with other defendants charged with making false statements in the Grand Jury where there was no allegation that such false testimony was part of the conspiracy?

3. Was the admission of evidence of another conspiracy between only two of the defendants so highly prejudicial to the other appellants as to have denied them fair trial?

4. Was the evidence sufficient to convict petitioner Grana of perjury when his answers were literally true?

5. Did the prosecutor's closing argument asking the jury to make an identification of Grana when the government's witness did not, deny the defendant Grana his constitutional right to confrontation of witnesses?

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall . . . be deprived of life, liberty, or property without due process of law. . . ."

Amendment 5 to the United States Constitution.

"In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation . . . to be confronted with the witnesses against him. . . ."

Amendment 6 to the United States Constitution.

RULES INVOLVED

Rule 8(b) of the Federal Rules of Criminal Procedure reads:

> "Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 14 of the Federal Rules of Criminal Procedure reads in part:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

REASONS FOR GRANTING THE WRIT

I.

THE JOINDER OF THE CONSPIRACY COUNT WITH FIFTEEN SEPARATE PERJURY COUNTS WAS IMPROPER UNDER RULE 8(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND FURTHER THE COURT SHOULD HAVE SEVERED THE COUNTS PURSUANT TO RULE 14.

A.

Petitioners Grana And Geraghty Were Prejudiced By The Joinder Of The Conspiracy Count With Other Counts Charging Them With Perjury.

All defendants were charged in Count I of the indictment with conspiracy to extort monies from tavern owners who were engaged in interstate commerce in violation of 18 U.S.C. 1951. Petitioners Geraghty and Grana were **The Joinder Of The Conspiracy Count With Other Counts** charged in counts 2 and 7, respectively, with committing perjury before a Grand Jury regarding the events which were the basis of the conspiracy count. Pre-trial motions to sever the counts were denied.

At the time that both petitioners testified before the Grand Jury there existed Rule 51 of the Chicago Police Department which allowed for disciplinary proceedings against any police officer who invoked his constitutional privilege against self-incrimination before a Grand Jury. While under the compulsion of exercising their constitutional right not to testify and thereby incurring possible revocation of their jobs, the petitioners answered the questions put to them in the Grand Jury. It is on the basis of

their answers denying any involvement in any illegal conduct which formed the basis for the perjury counts.

The trial jury was thus presented with knowledge that these petitioners were not believed by twenty-three other citizens when they denied the accusations against them. Had it not been for the joinder of the perjury counts no evidence of a perjury indictment would have been admissible in the conspiracy trial so that the prejudice of the joinder is manifest. Subsequent to the indictment Rule 51 was declared unconstitutional by the Seventh Circuit Court of Appeals, *Confederation of Police* v. *Conlisk*, 489 F. 2d 881 (7th Cir., 1974).

The Seventh Circuit also had difficulty originally deciding this question in the case of *United States* v. *Pacente* where the original Seventh Circuit panel held that the joinder was prejudicial under Rule 14, *United States* v. *Pacente*, 490 F. 2d 661 but *en banc* reconsideration of that opinion affirmed the joinder. *United States* v. *Pacente* (74-1988 filed Aug. 6, 1974).

What was in effect done here was that witnesses who later became defendants were arraigned under oath and when they denied the accusation, they were indicted for perjury. The stigma of standing trial on one charge is difficult enough without also having the trial jury constantly aware that other citizens such as they have deemed the defendants to be perjurers.

Because the Seventh Circuit had great difficulty in deciding this issue in *Pacente*, we urge this Court to make a definitive ruling on such a joinder.

B.

All The Petitioners Were Prejudiced By The Joinder Of the Conspiracy Count With All Other Defendants' Perjury Counts.

The conspiracy count of the indictment charged twenty-four defendants with agreeing to extort money under color of official right from various tavern owners in Chicago. There was no allegation that it was a part of the conspiracy that various defendants testify falsely when and if called before a Grand Jury, yet fifteen separate perjury counts were joined with the conspiracy count. Furthermore, petitioners McGee and Zakoian were never charged in a perjury count. Such joinder violates Rule 8(b) of the Federal Rules of Criminal Procedure and the trial court should have at least severed the counts pursuant to Rule 14 of the same rules.

Rule 8(b) specifically allows joinder of two or more defendants in the same indictment if they were alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

There is no allegation as mentioned above that there was ever an agreement to testify falsely and in fact, McGee and Zakoian risked their jobs (because of the aforesaid Rule 51) and stood on their constitutional rights not to testify.

A violation of Rule 8(b) requires a reversal. *MeElroy* v. *United States,* 164 U.S. 76, 17 S. Ct. 31, 41 L. Ed. 355 (1896); *Metheany* v. *United States,* 365 F. 2d 90 (9th Cir. 1966); *United States* v. *Spector,* 326 F. 2d 345 (7th Cir. 1963).

This Court in *McElroy* v. *United States, supra,* held:

> "The several charges in the four indictments were *not against the same* persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence."
>
> "While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, each joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed or prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

The Seventh Circuit has also held that the test for deciding whether acts of defendants are part of a series of transactions depends on the existence of a common plan. *United States* v. *Scott,* 413 F. 2d 932 (7th Cir. 1969).

The Eighth Circuit in *Chubet* v. *United States,* 414 F. 2d 1018 (8th Cir. 1969) was faced with an indictment wherein Chubet was charged in two counts with a man named Kauffman for the sale of certain drugs. Kauffman was also charged in four other counts with persons

other than Chubet for sales of the same drugs. The Court held in reversing Chubet's conviction that the mere fact that Kauffman was involved in all of the counts was insufficient for joining Chubet in the counts in which he was not involved.

The Tenth Circuit in *United States* v. *Eagleston*, 417 F. 2d 11 (10th Cir. 1969), the Count found an improper joinder where one defendant was not charged in a separate and distinct charge of the unlawful transportation of a stolen vehicle.

While Rule 8(a) of the Federal Rules of Criminal Procedure, which governs the question of joinder where there is only one defendant, allows for joinder of offenses which are of a similar nature, Rule 8(b), which governs joinder of multiple defendants, does not allow joinder merely because the offenses are similar in character. *United States* v. *Roselli*, 432 F. 2d 879 (9th Cir. 1970).

There was no allegation of a common plan to give false testimony and these petitioners whose cases were improperly joined could not avoid having the jury infer that because a Grand Jury believed that fifteen officers lied about receiving money there must therefore be some substance to the conspiracy count which charged them all with receiving the money.

There was no allegation nor was there any proof that any of these petitioners procured any false testimony or encouraged anyone to testify falsely before the Grand Jury. Rule 8(b) was violated and at the very least the Court should have severed the conspiracy count from all of the perjury counts pursuant to Rule 14.

II.

THE ADMISSION OF EVIDENCE OF ANOTHER CONSPIRACY IN WHICH NONE OF THE PETITIONERS WERE ALLEGED TO HAVE BEEN MEMBERS WAS SO HIGHLY PREJUDICIAL TO THE PETITIONERS AS TO HAVE DENIED THEM A FAIR TRIAL.

The Sixth Amendment to the United States Constitution guarantees each defendant the right to be informed of the nature and cause of the accusation. The indictment in this case charged the defendants with conspiracy to extort monies from taverns in the police district to which they were assigned. During the trial the Government introduced evidence of a separate conspiracy between two of the defendants and some of the unindicted co-conspirators to take money from night clubs in the district. Notwithstanding the fact that the Government, pursuant to Court order, furnished a Bill of Particulars naming the taverns from whom monies were taken, the Court allowed into evidence testimony regarding other establishments not named in the indictment nor in the Bill of Particulars to establish this separate conspiracy.

A co-conspirator testified about this separate conspiracy in his direct examination which took place over two days. It was not until the conclusion of the direct examination, at a point in time when the jury was allowed to absorb most of the damaging testimony overnight, that the Court instructed the jury that such evidence was only to be considered against Captain Braasch and Sgt. Barry. The testimony of this separate conspiracy referred to as the "Big Club" took up the better part of four

days of the trial. All motions for mistrial and severance because of this evidence were denied.

Needless to say the prejudice was overwhelming. The separate conspiracy was not charged in the indictment nor mentioned in any pre-trial discovery but nonetheless the defendants were forced to sit by helplessly while the jury was inundated with testimony of another extortion scheme by other persons which was much more serious in terms of financial amounts received by the police captain and his vice-coordinator.

The Seventh Circuit in *United States* v. *Varelli*, 407 F. 2d 737 (7th Cir. 1969) reversed the conviction therein because of evidence of separate and distinct conspiracies (which were joined in the indictment) may have prejudiced the jury against the defendants not charged in both conspiracies. This Court in *Kotteakos* v. *United States*, 328 U.S. 750, we had thought, made it clear long ago that improper joinder of separate conspiracies would not be countenanced.

The Seventh Circuit in its opinion of affirmance ruled that the motive for the Captain and his vice-coordinator to have allowed the conspiracy charged in the indictment could be shown by proof of other crimes and held that the trial judge is given wide discretion to balance the probative value of the evidence against its prejudicial effect. The Court also acknowledged that such evidence has a potentially prejudicial effect but the importance of the motive evidence along with limiting instructions prevented any prejudice.

Ironically, the Seventh Circuit only a few months before in *United States* v. *Ostrowsky*, 501 F. 2d 318 (7th Cir. 1974) held that during a trial for violation of the

Dyer Act, 18 U.S.C. 2313, proof of the murder of one of the owners of one of the automobiles involved was admissible to show how the defendants came into possession of the vehicle and further that the vehicle was taken without consent. The Court held, however, that the overemphasis of the murder denied the defendants a fair trial. The Court held:

> "The evidence of the other crime need only be clear and convincing. It need not, indeed should not, involve a trial within a trial." 501 F. 2d 318 at 321.

And while the Court of Appeals in the instant case deplored the conduct of the defendants the same Court in *Ostrowsky, supra,* held that a fair trial is required for every defendant regardless of his apparent guilt or the magnitude of the crimes he may have committed.

Your four petitioners, having nothing to do with the separate and distinct conspiracy, were prejudiced irreparably by such testimony and it violated their rights to be informed of the nature and cause of the accusation.

III.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE PETITIONER GRANA OF PERJURY AS HIS ANSWERS WERE LITERALLY TRUE.

In the Grand Jury Philip Grana was asked the following question:

> Q: "Sir, when you were in the 18th District, were you aware that at that time certain members of the vice squad were collecting money from various taverns and bars; and that the money was being split between *all* members of the vice squad?"
>
> A: "No, sir, I was not." (R. 5554)

The indictment charged that Grana testified falsely and that he denied that the money was being divided among *some* of the members of the vice squad (Count 7 of the indictment, Appendix C, infra).

Evidence which the trial established was that not all members of the vice squad received money. Therefore, Grana's statement was literally true and under the authority of *Bronston* v. *United States*, 409 U.S. 352, the defendant did not make a false declaration before the Grand Jury.

We do not contend that the question put to Grana was ambiguous or that his answer was unresponsive as the Court seems to state in its opinion (page 14). What we are saying is that he was asked about *all* of the members of the vice squad and he answered the question and the Government never proved anything to the contrary.

Because the Court of Appeals obviously misunderstood the purport of our argument, we respectfully request this Court to reverse the judgment on this Count.

IV.

PETITIONER GRANA WAS DENIED HIS RIGHT TO CONFRONTATION OF WITNESSES BY THE CONDUCT OF THE PROSECUTOR IN CLOSING ARGUMENT.

During the course of the trial a tavern owner named Sal Strazzante said that a person who said his name was Grana came to his tavern and received monies from him. When asked to identify Grana in open court the witness identified another defendant named Joseph Schillinger. The Court refused to strike the testimony of Strazzante but let it stand for what it was worth. In closing argument the following took place:

Mr. Webb (the prosecuting attorney): There was no identification of Grana in the courtroom. The identification was of Schillinger. If you look at the defendants, Grana and Schillinger as they sit in the courtroom now, you will see some similarities in their appearance.

Mr. Busch: That is objected to, your Honor.

The Court: You may proceed.

Mr. Webb: I ask you to look at Grana and look at Schillinger and there are similarities in their appearance. (R. 7048)

By asking the jury to make an identification of Grana when his own witness was unable to do so, the prosecutor was not only asking the jury to go outside of its function but was also denying Grana an opportunity to cross-examine anyone in that jury who took up the prosecutor's invitation to make the identification. It is quite possible that Grana and Schillinger looked alike to some jurors in 1973 (although there was no evidence as to how they looked in 1970 when the occurrence allegedly happened) and it is possible that other jurors may have reached other conclusions but Grana was unable to cross-examine those jurors who may have made the comparison and thereby convicted.

The only other evidence against Grana at the trial was that of an unindicted co-conspirator who said he gave money to Grana on a few occasions without any other conversation about where the money had come from or what the money was for. The jury identification which the prosecutor invited when his own witness failed to make the identification may very well have tipped the scales against petitioner Grana. Jurors are triers of the facts but they are not prosecution witnesses who can make

identification for the Government. To allow such conduct to go unchallenged goes a long way in destroying the opportunity to confront witnesses which is guaranteed by our Constitution.

CONCLUSION

For theforegoing reasons, John M. Geraghty, Philip R. Grana, Edward McGee and Mike Zakoian, respectfully move this Court to grant their petition for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals in the instant case.

Respectfully submitted,

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